

# DEPARTURES



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Office of General Counsel  
U.S. Sentencing Commission**

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# DEPARTURES

## I. Statutory Directives

### 18 U.S.C. § 3553

Although the Sentencing Reform Act of 1984 requires that a district court impose a sentence within the applicable guideline range in an ordinary case, 18 U.S.C. § 3553(a), it does not eliminate all of the district court's traditional sentencing discretion. Rather, it allows a departure from the guideline range if the court finds "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," 18 U.S.C. § 3553(b), or when the guidelines otherwise specifically provide for a departure.<sup>1</sup>

### 18 U.S.C. § 3742(a), (b)

Before the guidelines system was instituted, a federal criminal sentence within the statutory limits generally was not reviewable on appeal.<sup>2</sup> The Sentencing Reform Act of 1984 altered this scheme in favor of limited appellate jurisdiction to review federal sentences. Among other things, it allows a defendant to appeal an upward departure, and the government to appeal a downward departure.

## II. *Koon v. United States*

In *Koon v. United States*, 116 S. Ct. 2035 (1996), the Supreme Court examined the issue of the standard of review to be applied by appellate courts in assessing district court departure decisions. The Court unanimously joined in Justice Kennedy's opinion that an appellate court should not review a district court's departure decision *de novo*, but instead should ask whether the sentencing court had abused its discretion in granting the departure.

In reaching its decision, the Court emphasized the role the Sentencing Commission has in monitoring district court decisions and refining the guidelines to specify precisely when departures are permitted. The Court noted that before a departure is authorized, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the sentencing

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<sup>1</sup>This document does not discuss departures under 18 U.S.C. § 3553(e), USSG §5K1.1, departures for substantial assistance upon motion from the government.

<sup>2</sup>*Dorszynski v. United States*, 418 U.S. 424 (1974) (reiterating the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end).

guidelines. The Court further noted that sentencing courts are provided “considerable guidance” in this area by the *Guidelines Manual* as to which factors are likely or not likely to make a case atypical. The Commission has also recognized some factors which are “encouraged” and which the Commission has not been able to take into account fully in the guidelines such as victim provocation and disruption of a governmental function. *Id.* at 2045. A number of factors are regarded by the sentencing guidelines as “discouraged” such that the factor should be used only in exceptional cases. These factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Examples include the defendant’s family ties and responsibilities, education or vocational skills, and military service. *Id.* If a factor is one upon which the Commission encourages departure, and that factor is not taken into account by the applicable guideline, a court may exercise its discretion and depart on that basis, but, if the encouraged factor is already taken into account the applicable guideline, or if the factor is discouraged, the sentencing court may depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case in which the factor is present. *Id.* In addition, a number of factors such as race, sex, national origin and religion have been categorized as “forbidden” considerations in the departure decision process. *Id.* Finally, if a factor is unmentioned in the guidelines, the court must, after considering the “structure and theory of both relevant guidelines, and the guidelines taken as a whole,” decide whether it is sufficient to remove it from the heartland cases. *Id.* The court must bear in mind the Commission’s expectation that departures based on grounds not mentioned in the *Guidelines Manual* will be “highly infrequent.” *Id.* The Court also stated that whether a factor is a permissible basis for departure under any circumstances is a question of law, reviewable *de novo*, and the court of appeals need not defer to the district court’s resolution of the point. *Id.* at 2047.

Ultimately, a divided Court held that the district court in *Koon* had not abused its discretion in making a downward departure based on (1) the victim’s misconduct in provoking the defendant’s offenses, (2) susceptibility to abuse in prison, and (3) successive prosecutions. The Court found that the district court had abused its discretion, however, in making downward departures based on (1) the defendant’s low likelihood of recidivism and (2) the defendant’s collateral employment consequences because those factors had been adequately considered by the Commission.

A couple of miscellaneous notes about departures: *Koon* did not change the standard of review attending a district court’s decision not to depart. Such a decision is reviewable only if the district court mistakenly believes it lacks authority to depart. *See, e.g., United States v. Brown*, 98 F.3d 690 (2d Cir. 1996). Also, while a given factor may not be an appropriate basis for departure, it may still be relevant in choosing a particular sentence within the guideline range. At least one circuit, the Ninth, has held that *Koon* changed its standard of review on the extent of departures. *United States v. Sablan*, 114 F.3d 913 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 851 (1998). While other circuits have not yet squarely faced the question, the Tenth Circuit has disagreed, adhering to its former method of reviewing the extent of a district court’s departure. *United States v. Collins*, 122 F.3d 1297 (10th Cir. 1997); *see discussion infra* at Section V.

### **III. Post-*Koon* Appellate Court Departure Decisions**

In the departure cases discussed below, appellate courts, applying the standard articulated in *Koon*, have reversed or affirmed departure sentences based on numerous factors.<sup>3</sup>

## FORBIDDEN FACTORS

In addition to those factors listed in the guidelines as forbidden,<sup>4</sup> courts have held other factors to be *per se* invalid as a basis for departure.

*United States v. Rodriguez-Ochoa*, 169 F.3d 529 (8th Cir. 1999), upheld the district court's refusal to depart downward based on **defendants' mistake of fact** where they contended they **believed they were transporting a different type of drug**. The court of appeals held that the guidelines explicitly consider the effect of a drug defendant's mistake of fact on his or her sentencing accountability in §1B1.3, comment. (n.2(a)(1)), and the district court could not depart on that basis.

*United States v. Abuhouran*, 161 F.3d 206 (3d Cir. 1998), held that the district court does not have the authority, under §5K2.0, to grant a downward departure based on the defendant's **substantial assistance in the absence of a government motion** under §5K1.1. Whether the government makes a motion cannot be considered an unmentioned sentencing factor. An "unmentioned factor" is a factor which has no semantic or practical equivalent or substitute in the guidelines and no mentioned factor encompasses it.

*United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998), held that the defendant's **exemplary behavior during the pendency of his appeals** was not a valid basis for departure.

*United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999), upheld the district court's refusal to depart downward based on the fraud **victim's receipt of a \$6,000,000 judgment in its civil fraud action** against the defendant for the conduct at issue in the criminal case. The court concluded that an adverse judgment in a prior civil case involving the same fraudulent conduct is not a permissible basis to reduce the prison sentence for the criminal fraud. The court distinguished the adverse civil judgment against the defendant from the substantial, voluntary restitution that was held to be a permissible basis for downward departure in *United States v. Garlich*, 951 F.2d 161, 163 (8th Cir. 1991). It is entirely foreseeable that fraud victims will seek to recover their damages in civil actions against fraud perpetrators; thus an **adverse civil**

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<sup>3</sup>These departure factors are listed in accordance with the courts of appeals' classification of them as discouraged, encouraged, *etc.* It should not be inferred that the Sentencing Commission agrees in all cases with a court's classification of a given factor.

<sup>4</sup>Section 5H1.10 (Race, Sex National Origin, Creed Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse, and the last sentence of §5K2.12 (Coercion and Duress).

**judgment** does not warrant a downward departure because it does not take a fraud case out of the heartland of §2F1.1.

*United States v. G.L.*, 143 F.3d 1249 (9th Cir. 1998), reversed an upward departure based on the district court's concern that three auto **thefts were overshadowed by the defendant's conviction for involuntary manslaughter**. The court of appeals held that the correct course is a sentence in the upper regions of the guidelines range rather than a departure. Also, the **destruction of the vehicles** was taken into account by the guidelines, since the loss figure is the same whether or not the stolen property is recovered.

*United States v. Dominguez-Carmona*, 166 F.3d 1052 (10th Cir. 1999), reversed a departure based in part on the **amount of marijuana contained in the defendants' respective individual backpacks**, rather than the total amount of drugs attempted to be transported in all the backpacks involved; the guidelines specifically direct that the sentence be based on the total amount of drugs in circumstances like defendants'.

*United States v. Willis*, 139 F.3d 811 (11th Cir. 1998), noted that permitting departure based on the **disparity with a codefendant's state court sentence** would create system-wide disparities among federal sentences.

*United States v. Saldana*, 109 F.3d 100 (1st Cir. 1997), rejected the defendant's claim that the **government's delay in prosecuting** his illegal re-entry conviction was grounds for departure, where he argued that had the charge been brought earlier, his sentence could have run concurrently with a state conviction on another drug conviction.

*United States v. Snyder*, 136 F.3d 65 (1st Cir. 1998), and *United States v. Searcy*, 132 F.3d 1421 (11th Cir. 1998), held that **disparity between federal and state sentencing** is a forbidden departure factor. Prior to *Koon*, other circuits had reached the same conclusion. See, e.g., *United States v. Haynes*, 985 F.2d 65, 69-70 (2d Cir. 1993); *United States v. Deitz*, 991 F.2d 443, 447-48 (8th Cir. 1993); *United States v. Sitton*, 968 F.2d 947, 962 (9th Cir. 1992); and *United States v. Dockery*, 965 F.2d 1112, 1117-18 (D.C. Cir. 1992).

*United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir.), *cert. denied*, 118 S. Ct. 1855 (1998), upheld a district court's decision that it lacked authority to depart based on the defendant's willingness to stipulate to deportation, his age, and the deterrent effect he experienced when hospitalized for ingesting the heroin he attempted to import. The court held that **a defendant without a nonfrivolous defense to deportation presents no basis for downward departure by simply consenting to deportation**, and a district court cannot depart downward on this basis without a request from the government.

*United States v. Weinberger*, 91 F.3d 642 (4th Cir. 1996), reversed a downward departure based on the defendant's **exposure to civil forfeiture**. According to the appellate court, the mandate of §5E1.4 (Forfeiture) means "that the Commission viewed monetary

forfeiture as entirely distinct from the issue of imprisonment.” Therefore, exposure to civil forfeiture was not a valid reason for departure under §5K2.0.

*United States v. Banks*, 130 F.3d 621 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1400 (1998), found that **harsher penalties for crack** than for powder cocaine was not a permissible basis for departure.

*United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), *cert. denied*, 529 U.S. 1281 (1997), remanded a downward departure where the departure was based on **time served for the defendant’s expired sentence**. According to the appellate court, a sentencing court cannot depart downward and reduce a defendant’s sentence for drug conspiracy based on the time served for a prior drug conspiracy conviction despite the fact that prior conviction served as predicate conduct for the subsequent conviction. The court rejected departing when §5G1.3 does not give credit for a previously discharged related sentence, concluding that the Sentencing Commission did not leave unaddressed the question of whether a sentencing judge can give credit for discharged sentences, but rather consciously denied that authority.

*United States v. Wilke*, 156 F.3d 749 (7th Cir. 1998), reversed a downward departure for a defendant convicted of a child pornography offense based on **susceptibility to abuse in prison**. A court may not rely on the **nature of defendant’s offense** as a factor justifying such a departure, although the court could consider the defendant’s sexual orientation and demeanor.

*United States v. Kapitzke*, 130 F.3d 820 (8th Cir. 1997), held that the defendant’s **susceptibility to abuse in prison, based on his status as a child pornographer**, could not be the basis for a downward departure, absent exceptional circumstances. Otherwise, every child pornographer would be eligible for a departure.

*United States v. Wind*, 128 F.3d 1276 (8th Cir. 1997), rejected a downward departure based on the district court’s finding that the defendant, convicted of possession and distribution of child pornography, **was not a child predator or pedophile** and had not committed more serious offenses. The defendant’s lack of sexual tendencies toward children did not make his possession of child pornography significantly different from the normal case of child pornography possession.

*United States v. Polanco*, 53 F.3d 893, 898 (8th Cir. 1995), *cert. denied*, 518 U.S. 1021 (1996), held that, because the guidelines adequately account for the absence of a criminal record, the **defendant’s lack of criminal history** cannot remove a case from the heartland.

*United States v. McCloud*, 127 F.3d 1284 (10th Cir. 1997), found that **harsher penalties for crack** than for powder cocaine was not the sort of discrete, individual, and case-specific mitigating circumstance justifying downward departure.

*United States v. Hoffer*, 129 F.3d 1196 (**11th Cir.** 1997), reversed a downward departure for the defendant's **loss of his medical license and voluntary disgorgement** of proceeds. The court noted that the defendant received a §3B1.3 enhancement for using his special skill and abusing the position of trust he held as a physician to facilitate the commission of his crimes. The abuse of such trust warrants loss of the position of trust and allowing a downward departure for the loss of the medical license would nullify the mandate of §3B1.1. The voluntary disgorgement was a **civil forfeiture**, which can never be the basis for a downward departure, because under §5E1.1, the Commission viewed forfeiture as a wholly separate sanction in addition to imprisonment.

*United States v. Webb*, 134 F.3d 403 (**D.C. Cir.** 1998), held that the **district court's opinion that the guideline range is too harsh** is not a permissible basis for departure.

### **DISCOURAGED FACTORS**

*United States v. Hairston*, 96 F.3d 102 (**4th Cir.** 1996), *cert. denied*, 117 S. Ct. 956 (1997), reversed a downward departure based on the defendant's **"extraordinary" restitution**. According to the appellate court, restitution was a discouraged factor and the amount of restitution in the instant case was not "extraordinary."

*United States v. Velez*, 168 F.3d 1137 (**9th Cir.** 1999), reversed an upward departure based on the **number of false documents** involved where the **1994 guidelines** under which defendant was sentenced provided for a fixed increase for "100 or more" documents. The court of appeals held that this language indicated that the Commission had considered situations in which the number of documents exceeded 100. By departing on this basis, the district court exceeded the maximum provided on the face of the guidelines. The court of appeals stated that the fact that application note 5, allowing departure on this basis, was later added does not change the analysis.

### **Age — §5H1.1**

*United States v. Marin-Castaneda*, 134 F.3d 551 (**3d Cir.**), *cert. denied*, 118 S. Ct. 1855 (1998), upheld a district court's decision that it lacked authority to depart based in part on the defendant's age, 67, absent some extraordinary infirmity.

### **Physical Condition, Including Drug or Alcohol Dependence or Abuse — §5H1.4**

*United States v. Russell*, 156 F.3d 687 (**6th Cir.** 1998), held that **defendant's deafness** did not qualify him for downward departure under the guidelines for extraordinary physical impairment where the defendant did not allege that prison services were inadequate to accommodate his disability or that he was not protected against attackers.

*United States v. Webb*, 134 F.3d 403 (**D.C. Cir.** 1998), held that **defendant's drug addiction** cannot form the basis for departure.



### **Employment Record — §5H1.5**

*United States v. Jones*, 158 F.3d 492 (10th Cir. 1998), upheld a downward departure based in part of the defendant's **long-term work history in an economically depressed area** with few employment opportunities as well as on the **adverse impact incarceration would have on his future employment prospects**, in light of the community in which he lives. The court noted that the Supreme Court in *Koon* okayed consideration of collateral employment consequences. "A factor may be considered in the aggregate if it is 'atypical' even though it may not be sufficient, in and of itself, to support a departure.

### **Family Ties and Responsibilities, and Community Ties — §5H1.6**

*United States v. Owens*, 145 F.3d 923 (7th Cir. 1998), held that it was not error to depart downward for **extraordinary family circumstances** where the defendant's common-law wife and children would have to go on public assistance; while the case was not the most compelling for departure, the court of appeals refused to second-guess the district court's decision.

*United States v. Jones*, 158 F.3d 492 (10th Cir. 1998), held that a defendant's **inability to pay child support** to his estranged wife if imprisoned was not a permissible basis for departure.

*United States v. Faria*, 161 F.3d 761 (2d Cir. 1998), vacated a downward departure based on **family circumstances**, holding that the hardship the defendant's incarceration would cause his children and ex-wife fell well short of what was required where, although the defendant paid child support, he no longer lived with his children, and his ex-wife earned approximately \$40,000 per year.

*United States v. Sprei*, 145 F.3d 528 (2d Cir. 1998), overturned a **family ties** downward departure based on the unique responsibility the defendant, as a Hasidic Jew, bore for his children's marriages. The defendant's children's circumstances were not very different from the those of other defendants' children in that the stigma of their parent's punishment lessened their desirability as marriage partners. The court also noted the impropriety of treating adherents of one religious sect differently from another.

*United States v. Galante*, 111 F.3d 1029 (2d Cir.), *denial of reh'g en banc*, 128 F.3d 788 (2d Cir. 1997), affirmed a downward departure based on a finding that the **hardship on the defendant's family** caused by his incarceration would be exceptional. According to the appellate court, though the facts could have been construed differently, "we may not simply substitute our judgment for [that of the district] court." On a denial of rehearing en banc, the court stated that the opinion was limited to its facts and should not be seen as an invitation to depart in the absence of exceptional family circumstances.

*United States v. Wilson*, 114 F.3d 429 (**4th Cir.** 1997), reversed a downward departure based on **family ties**. The appellate court concluded that the defendant's recognition of family responsibility, manifested partly by his decision to keep the out-of-wedlock baby he fathered, was not "sufficiently extraordinary" to support a downward departure.

*United States v. Archuleta*, 128 F.3d 1446 (**10th Cir.** 1997), rejected a downward departure for **family circumstances** where there was no one but the defendant to care for his two children and his diabetic mother; a defendant's status as a single parent is not an extraordinary family circumstance warranting departure and the record contained no information about the care his mother required.

**Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works — §5H1.11**

*United States v. Crouse*, 145 F.3d 786 (**6th Cir.** 1998), held that the defendant's **exceptional civic involvement** was sufficient to take the case out of the heartland of white collar offenders.

*United States v. Woods*, 159 F.3d 1132 (**8th Cir.** 1998), upheld a 1-level downward departure for the defendant's extensive **charitable activities**; defendant brought two troubled young women into her home, including a former employee who had stolen from her, and paid for them to attend private high school, and both women became productive members of society, and the defendant also assisted elderly friend to move from nursing home to apartment and helped care for him so that he could live out his remaining years with greater independence.

**ENCOURAGED FACTORS**

*United States v. Doe*, 149 F.3d 634 (**7th Cir.** 1998), upheld an upward departure to account for the **concentrated form of heroin** involved; the court departed 6 levels to the offense level appropriate if the high-purity heroin had been converted to street-level purity. The court stated that §2D1.1 was intended to work in this way.

*United States v. Mapp*, 1999 WL 140591 (**2d Cir.** Mar. 16, 1999), upheld an upward departure based on the district court's finding, by clear and convincing evidence, that the defendant **participated in three robberies that had been charged in the indictment but as to which the jury was unable to reach a verdict**.

### **Single Act of Aberrant Behavior — §1A4(d)**

*Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998), upheld the district court's refusal to depart downward for **aberrant behavior**. The Second Circuit joined the First, Ninth and Tenth Circuits in concluding that aberrant behavior is conduct which constitutes "a short-lived departure from an otherwise law-abiding life," and that the best test by which to judge whether conduct is truly aberrant is the totality test. For purpose of determining eligibility for an aberrant behavior departure, courts may consider the following nonexclusive, nondispositive factors: (1) the singular nature of the criminal act, (2) the defendant's criminal record, (3) the degree of spontaneity and planning inherent in the conduct, (4) extreme pressures acting on the defendant, including any psychological disorders from which he may have been suffering, at the time of the offense, (5) the defendant's motivations for committing the crime, including any pecuniary gain he derived therefrom, and (6) his efforts to mitigate the effects of the crime.

*United States v. Bradstreet*, 135 F.3d 46 (1st Cir. 1998), overturned an **aberrant behavior** departure where the defendant testified dishonestly at trial. The court noted that an aberrant behavior departure is not warranted unless the conduct at issue is both a marked departure from the past and is unlikely to recur. One who testifies dishonestly after engaging in felonious dishonesty cannot credibly make either claim.

*United States v. Weise*, 128 F.3d 672 (8th Cir. 1997), reversed a downward departure where the defendant's conduct was not a "**single act of aberrant behavior**," and the district court did not make a "refined assessment" of how the **difficulty of reservation life**, skewed the defendant's opportunities in a way strikingly different from families of similar means and circumstances living elsewhere.

*United States v. Kalb*, 105 F.3d 426 (8th Cir. 1997), reversed a downward departure based on the defendant's "**single act of aberrant behavior**." According to the appellate court, because the guidelines discuss aberrant behavior departures only in the context of probation, the factor is an encouraged one only when a defendant may qualify for a sentence of probation; otherwise the factor is unmentioned. The court found the departure unwarranted because the sentencing court failed to consider the structure and theory of the relevant guidelines and did not adequately analyze how and why specific conduct by the defendant was allegedly aberrant.

### **First Degree Murder — §2A1.1**

*United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999), upheld the district court's refusal to depart based on defendant's contention that he **did not cause death intentionally or knowingly**, pursuant to §2A1.1, comment. (n.1). Nichols argued that the district court was required first to make findings regarding the defendant's mental state in its determination whether a downward departure is appropriate. The court of appeals held that nothing in the guideline requires the district court to make any such findings before deciding whether to depart, disagreeing with *United States v. Prevatte*, 16 F.3d 767, 784 (7th Cir.1994).

### **Involuntary Manslaughter — §2A1.4**

*United States v. Whiteskunk*, 162 F.3d 1244 (**10th Cir.** 1998), upheld a 3-level upward departure based on the defendant's **excessive recklessness**. The defendant was convicted of involuntary manslaughter; the court cited, as factors taking her conduct of driving while intoxicated out of the heartland of typical cases, that her blood alcohol content was more than twice the legal limit, that she had sustained prior conviction for driving while intoxicated, and that she had at least three opportunities to correct her behavior.

*United States v. Terry*, 142 F.3d 702 (**4th Cir.** 1998), ordered a remand to consider whether the danger created by the defendant's **reckless conduct** while driving was outside the "heartland" of the typical reckless driving involuntary manslaughter case. The circuit court noted that reckless driving is already taken into account by the involuntary manslaughter guideline. Under *Koon*, the sentencing court therefore must determine whether the defendant's reckless driving was "present to an exceptional degree" or was in some other way different from the ordinary case where the factor is present.

### **Extortion — §2B3.2**

*United States v. Cuddy*, 147 F.3d 1111 (**9th Cir.** 1998), upheld a 2-level departure based on an application note to the extortion guideline, which states that an upward departure may be warranted if the offense involved a **threat to a family member of the victim**. The defendants were convicted of interference with interstate commerce by threats of violence after kidnapping the daughter of a hotel owner and demanding ransom. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.

### **Fraud — §2F1.1**

*United States v. Robie*, 166 F.3d 444 (**2d Cir.** 1999), vacated a sentence wherein the district court had erroneously based its calculation of loss on the gain to the defendant. The court of appeals noted that, on remand, the district court may wish to depart under the provision in the fraud guideline that where the **loss determined does not fully capture the harmfulness** of the conduct, an upward departure may be warranted. The defendant stole misprinted postal stamps from the Postal Service and sold them to collectors, after misrepresenting that they had been issued by the Postal Service. The Postal Service was the victim of the theft but suffered no "direct" loss as a result, since the Postal Service had no value for the stamps beyond their destruction. Theft of the misprints would be an appropriate application of the departure provision because of the real but intangible loss in the form of embarrassment and the appearance of incompetence inflicted on the Postal Service.

*United States v. Stockheimer*, 157 F.3d 1082 (**7th Cir.** 1998), held that, where the offense level for mail and bank fraud was based on an intended loss of \$80 million, but neither the actual

nor the probable loss rose to that level, the district court erred in refusing to consider a downward departure based on the **economic reality of the intended loss**.

*United States v. Bonanno*, 146 F.3d 502 (7th Cir. 1998), held that a departure for **low probability of success** of a scheme to defraud was not applicable when the victims had been bilked of over \$600,000.

#### **Hate Crime Motivation or Vulnerable Victim — §3A1.1**

*United States v. Brown*, 145 F.3d 477 (6th Cir. 1998), upheld an upward departure based on the **age of telemarketing victims**. Congress expressed the view, manifest in the Senior Citizens Against Marketing Scams, that the guidelines do not sufficiently punish defendants who target the elderly; such offense behavior is not adequately accounted for by relevant conduct, role in the offense or vulnerable victim adjustments.

*United States v. Johnson*, 152 F.3d 553 (6th Cir. 1998), reversed an upward departure based on defendant's setting fire to an automobile at the entrance of a church under the heating and cooling unit, thereby **endangering the firefighters** who had to use this entrance. This factor was invalid because there were other entrances to the church and the circumstances of the fire were well within the heartland of cases. Nor were defendant's **racist motives in setting the fire** proper bases for departure since they were already accounted for by an enhancement under §3A1.1(a).

#### **Aggravating or Mitigating Role in the Offense — §§3B1.1 and 3B1.2**

*United States v. Cali*, 87 F.3d 571 (1st Cir. 1996), affirmed an upward departure based on a finding that the defendant's management of the assets of a large-scale criminal enterprise was outside the heartland of the **aggravated role** adjustment.

*United States v. Romualdi*, 101 F.3d 971 (3d Cir. 1996), reversed a downward departure based on a finding that the defendant's conduct, possession of child pornography, was analogous to a situation qualifying for a **mitigating role reduction**. According to the appellate court, because the defendant pleaded guilty to possession of child pornography, an offense not requiring concerted activity, the mitigating role adjustment is not available by analogy or otherwise.

#### **Use of a Minor — §3B1.4**

*United States v. Porter*, 145 F.3d 897 (7th Cir. 1998), upheld a departure based on the **use of a minor** in furthering a mail fraud.

#### **Obstructing or Impeding the Administration of Justice — §3C1.1**

*United States v. Ventura*, 146 F.3d 91 (2d Cir. 1998), held that, even though submitting false birth documents expressly falls under the obstruction guideline, the 2-level **obstruction** increase was inadequate to account for all of the defendant's obstructive behavior. The defendant submitted purported Honduran documents which falsely established him to have been a juvenile at the time of certain obstructive conduct, thereby making him a candidate for more lenient sentencing treatment. The departure was proper to the extent that the defendant's atypical obstructive conduct took his case outside the heartland of the obstruction guideline.

### **Post-Offense Rehabilitation — §3E1.1**

*United States v. Bryson*, 163 F.3d 742 (2d Cir. 1998), vacated a downward departure based on **post-offense rehabilitation** where the evidence was insufficient to support a conclusion that rehabilitation had taken place and district court had only vaguely stated its findings on rehabilitation while expressing dissatisfaction with the guideline range.

*United States v. Core*, 125 F.3d 74 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 735 (1998), remanded a case to the district court to determine whether the defendant's **post-offense rehabilitation while in prison** warranted a downward departure when he appeared before the court for resentencing. The appellate court found nothing in the pertinent statutes or guidelines to prevent a sentencing judge from considering rehabilitation in prison as a basis for departure if resentencing becomes necessary. The court acknowledged the mention of post-offense rehabilitation in the acceptance of responsibility guideline, but did not interpret that to preclude consideration of such rehabilitation as a basis for departure. The court's analysis concluded that such rehabilitation, if sincere, is not adequately taken into account by the guidelines.

*United States v. Green*, 152 F.3d 1202 (9th Cir. 1998), held that, under *Koon*, **post-offense rehabilitation** is a proper basis for departure.

*United States v. Whitaker*, 152 F.3d 1238 (10th Cir. 1998), held that post-offense rehabilitation can form the basis for departure, noting that *Koon* effectively overruled prior circuit precedent to the contrary.

*United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998), *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997), *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997), and *United States v. Kapitzke*, 130 F.3d 820 (8th Cir. 1997), all held that **post-offense rehabilitation** is a factor already taken into account by the acceptance of responsibility guideline, §3E1.1; thus, departure is warranted only if the defendant's efforts are exceptional enough to be atypical of cases in which the acceptance of responsibility adjustment is usually granted.

### Adequacy of Criminal History Category — §4A1.3

*United States v. Millsaps*, 157 F.3d 989 (5th Cir. 1998), held that an upward departure based on **charges in the superseding indictment that were subsequently dismissed** did not violate due process.

*United States v. Perez*, 160 F.3d 87 (1st Cir. 1998), upheld a refusal to depart downward from **career offender status on the basis that it overstated the seriousness** of her conduct: defendant claimed that she was a “small player,” outside the heartland of career offenders, because the amounts of drugs, and her role in the offenses, had been small.

*United States v. Hernandez*, 160 F.3d 661 (11th Cir. 1998), vacated an upward departure based on **three dismissed counts** of deposit account fraud listed in the presentence investigation report, since the report did not relate the facts on which the counts were based and the defendant denied that he engaged in the alleged fraud.

*United States v. Melgar-Galvez*, 161 F.3d 1122 (7th Cir. 1998), upheld a 1-level upward departure based on district court’s belief that since the defendant had amassed **18 criminal history points**, the criminal history category did not reflect the seriousness of his prior record. The court of appeals noted that an upward departure may be based strictly on an **excess number of criminal history points**.

*United States v. King*, 150 F.3d 644 (7th Cir. 1998), approved an upward departure under §4A1.3 for the commission of **five bank robberies while on supervised release from earlier conviction for bank robbery**.

*United States v. Tejada*, 146 F.3d 84 (2d Cir. 1998), rejected a departure on the basis that the defendant’s **career offender status significantly overstated the seriousness** of his criminal history. The court noted that the light sentences the defendant received for his predicate offenses more appropriately warrant upward departure.

*United States v. Ward*, 131 F.3d 335 (3d Cir. 1997), affirmed an upward departure based on a prior sexual assault for a defendant being sentenced for kidnaping and sexual assault. The **prior similar conviction was not adequately considered** in the defendant’s criminal history because, in view of the defendant’s current offense, there is a qualitative difference between a conviction for any offense resulting in a term of imprisonment of more than one year and a conviction for a prior sexual assault.

*United States v. Ewing*, 129 F.3d 430 (7th Cir. 1997), affirmed an upward departure based on the defendant’s **high number of criminal history points (25), outdated prior sentences**, and a finding that the **defendant repeatedly committed the same offense**.

*United States v. Collins*, 104 F.3d 143 (8th Cir. 1997), affirmed an upward departure based on findings that the defendant's **criminal history category did not adequately reflect the seriousness** of the defendant's past criminal conduct in light of evidence that the defendant participated in approximately 16 burglaries for which neither state nor federal charges were ever brought.

*United States v. Lowe*, 106 F.3d 1498 (10th Cir.), *cert. denied*, 521 U.S. 1110 (1997), affirmed an upward departure based on a finding that the defendant's **status as a career offender did not adequately represent the defendant's criminal past**. According to the appellate court, although the defendant's criminal history score was relatively low (16), the nature of the defendant's prior offenses warranted an upward departure from Criminal History Category VI.

*United States v. Collins*, 122 F.3d 1297 (10th Cir. 1997), affirmed a downward departure for a defendant who **technically qualified as a career offender** but whose criminal history and likelihood of recidivism significantly differed from the heartland of career offenders. The sentencing court based its finding on a combination of the defendant's **age** (64 at sentencing), **infirmities** (heart disease, high blood pressure, ulcers, arthritis, prostatitis) and the **fact that one predicate conviction was almost ten years old and had resulted in a relatively lenient sentence**. The appellate court stated that, taken in the context of the other circumstances of a defendant's criminal history, age could be germane to whether the career offender category is appropriately applied to a defendant.

### **Death — §5K2.1**

*United States v. Van Metre*, 150 F.3d 384829 (4th Cir. 1998), noted that the kidnapping guideline provided an adjustment if the kidnapping was done to facilitate the commission of another offense. In this case, however, the victim was kidnapped for the purpose of sexual assault and only later did the defendant form the intent to murder her. Because the guideline does not take into account these facts, an upward departure to life imprisonment based on the **kidnaping victim's death** was not an abuse of discretion.

*United States v. Terry*, 142 F.3d 702 (4th Cir. 1998), remanded for further findings in accordance with the dictates of the guidelines where the district court departed upward 4 levels for the **uncharged death of a participant** in the aggressive driving that led to the defendant's conviction for involuntary manslaughter. The death of a victim who participated in the activity that resulted in his death can form the basis for departure; the district court should have made findings to support the level of departure, including findings on whether the defendant's recklessness was adequate to establish malice.



### **Extreme Psychological Injury — §5K2.3**

*United States v. Jacobs*, 167 F.3d 792 (3d Cir. 1999), remanded a 5-level upward departure under §5K2.3 for “**extreme psychological injury**” because the district court did not find that the victim’s psychological injury was “much more serious than that normally resulting from the commission” of the crime of aggravated assault, a finding that is a prerequisite for a departure under §5K2.3. The district court focused on a portion of the guideline that explains the types of situations which may rise to the level of psychological injury without making the preliminary finding of injury beyond the heartland of injuries from the same offense.

*United States v. Wells*, 101 F.3d 370 (5th Cir. 1996), affirmed an upward departure based on a finding that the defendant’s conduct caused **substantial harm to the victims** stemming from a credit card scheme which led to years of harassment by creditors, forced court appearances, forgery charges, and constant fear of arrest.

### **Disruption of a Government Function — §5K2.7**

*United States v. Baird*, 109 F.3d 856 (3d Cir.), *cert. denied*, 118 S. Ct. 243 (1997), affirmed an upward departure based on consideration of underlying counts dismissed pursuant to a plea agreement. The district court found that the defendant’s involvement in a large police corruption scandal in Philadelphia caused a significant **disruption of governmental functions** pursuant to §5K2.7 and warranted an upward departure.

*United States v. Horton*, 98 F.3d 313 (7th Cir. 1996), reversed in part an upward departure and remanded for a determination of the extent of the departure “in view of the scant grounds” articulated. The basis for the upward departure, that the defendant’s conduct resulted in a **significant disruption of a governmental function**, was affirmed.

### **Extreme Conduct — §5K2.8**

*United States v. Roston*, 168 F.3d 377 (9th Cir. 1999), approved a 7-level upward departure for **extreme conduct** where defendant was convicted of second-degree murder for killing his wife on their honeymoon. The court noted that, although such a departure is substantial, the district court was well-positioned to determine if the facts of this case were unusually cruel or brutal, as compared to other second-degree murder cases. “It is appropriate to defer to the district court’s assessment in this case.”

*United States v. Davis*, 1999 WL 149760 (6th Cir. Mar. 22, 1999), upheld an 8-level upward departure for **extreme conduct** based on a telemarketer’s extremely demeaning conduct toward his victims, noting that, although there was no serious physical injury, there was intentional infliction of psychic injury. The court of appeals reversed the upward departure on the same basis for a codefendant who the district court had described as using a “friendly demeanor that resulted in psychological harm to his victims.”

*United States v. Cross*, 121 F.3d 234 (6th Cir. 1997), affirmed an upward departure based on the defendant's participation in **torturing the victim**. The appellate court concluded that the defendant's conduct which formed part of a count dismissed pursuant to a plea agreement could still be considered as a basis for an upward departure.

*United States v. Sherwood*, 98 F.3d 402 (9th Cir. 1996), reversed in part an upward departure based on the defendant's conduct toward a kidnaping victim. According to the appellate court, the abuse was so unusual and degrading that it warranted a departure for **extreme conduct**.

*United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996), affirmed an upward departure based on prolonged harassing and humiliating conduct directed toward the defendant's former high school girlfriend and her family. According to the appellate court, the harassment violated state and federal restraining orders and warranted a departure for **extreme conduct**.

*United States v. Lewis*, 115 F.3d 1531 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 733 (1998), affirmed an upward departure based on the **degrading nature of the defendant's sexual assaults**. According to the appellate court, the number of assaults involved and the viciousness of the acts were degrading in type, insulting in nature, and represented an encouraged basis for departure from the guidelines.

### **Lesser Harms — §5K2.11**

*United States v. Clark*, 128 F.3d 122 (2d Cir. 1997), remanded a district court's denial of downward departure based on the **lesser harms** paragraph of §5K2.11 for a felon who had illegally purchased a firearm for his brother. The court noted that the second paragraph, where a defendant's **conduct might not have caused the harm sought to be prevented**, might have applied, and the district court may have misunderstood its authority to depart.

*United States v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996), remanded a downward departure for "**lesser harms**," based on the defendant's belief that his girlfriend was in danger, directing the district court to explain the magnitude of the departure.

*United States v. Bernal*, 90 F.3d 465 (11th Cir. 1996), affirmed a downward departure based on a finding that the defendant's **conduct did not threaten the harm sought to be prevented** by the statutes of conviction. The defendant was convicted of attempting to export an orangutan and a gorilla. The defendant intended to export animals for breeding and exhibition. According to the appellate court, the "special factor" in this case was an encouraged departure factor listed at §5K2.11.

### Coercion and Duress — §5K2.12

*United States v. Gallegos*, 129 F.3d 1140 (**10th Cir.** 1997), rejected a downward departure based, among other things, on coercion, where the only evidence was the defendant's comment that she would not testify against a codefendant because she was scared. Coercion must involve a threat of physical injury, substantial damage to property or similar injury, and it must also occur at the time of the offense.

### Diminished Capacity — §5K2.13

*United States v. Valdez*, 158 F.3d 1140 (**10th Cir.** 1998), held that a defendant convicted of bank robbery, which requires the use of force and violence or intimidation, was not eligible for a downward departure for non-violent offense committed by a defendant suffering from **significantly reduced mental capacity**.

*United States v. Miller*, 146 F.3d 1281 (**11th Cir.** 1998), reversed a departure based on the defendant's **impulse control disorder** and on the **defendant's claim that, despite his conviction, he was not a pedophile**. The defendant argued that he used the images of children in barter to get pornographic images he was interested in and that his impulse control disorder contributed to his pornographic interest. The court of appeals rejected the departure on several grounds. First, just because the defendant was not a pedophile, the harm in the offense is sustaining a market for child pornography, of which the defendant was guilty. Second, impulse control disorders are not unusual among those who collect child pornography, so this aspect of the defendant's personality did not separate him from other defendants. Finally, the testimony failed to link the disorder to the offense, so no §5K2.13 departure for **diminished capacity** was appropriate.

*United States v. McBroom*, 124 F.3d 533 (**3d Cir.** 1997), remanded where the district court failed to make a factual finding regarding the possibility that the defendant suffered from a volitional impairment which prevented him from controlling his behavior or conforming to the law. The appellate court agreed with the defendant that the definition of "**significantly reduced mental capacity**" contained a volitional component not adequately considered by the district court when determining the defendant's eligibility for a downward departure pursuant to **§5K2.13**.

*United States v. Withers*, 100 F.3d 1142 (**4th Cir.** 1996), *cert. denied*, 520 U.S. 1132 (1997), remanded a downward departure based on **diminished mental capacity**. According to the appellate court, because there was no demonstration that the defendant's significantly reduced mental capacity bore a causal relationship to the crime or that the defendant had an inability to process information, there was no support for such a significant departure.

*United States v. Barajas-Nunez*, 91 F.3d 826 (**6th Cir.** 1996), remanded a downward departure for **diminished mental capacity** based on the defendant's **lack of education and**

**inability to speak English.** According to the appellate court, these factors did not constitute diminished mental capacity as a matter of law, and were otherwise invalid or discouraged. The other ground for the departure, “**lesser harms,**” based on the defendant’s belief that his girlfriend was in danger, was not found to be plainly erroneous. On remand, the district court was directed to explain the magnitude of the departure.

#### **Public Welfare — §5K2.14**

*United States v. Hardy*, 99 F.3d 1242 (1st Cir. 1996), affirmed an upward departure based on the defendant’s **persistent ten-year history of violent antisocial behavior** and dangerous gang-related conduct underlying the offense. The appellate court concluded that shooting indiscriminately into crowded areas and discarding weapons in residential neighborhoods **threatened public safety** and warranted an upward departure.

#### **Voluntary Disclosure of Offense — §5K2.16**

*United States v. Jones*, 158 F.3d 492 (10th Cir. 1998), upheld a downward departure based in part on the defendant’s **voluntary disclosure of facts underlying his false statements** offense. While the defendant was not motivated by the knowledge that discovery of his offense was imminent, as required for departure under §5K2.16, the offense was nonetheless likely to be discovered. Thus, the circumstances fall in between the express provisions of §5K2.16. The fact that the defendant received a 3-level downward adjustment for acceptance of responsibility does not preclude departure on this basis; the acceptance reduction is easily achieved where the defendant enters a timely guilty plea and would not account for this defendant’s actions.

*United States v. Besler*, 86 F.3d 745 (7th Cir. 1996), remanded a downward departure where the defendant **voluntarily disclosed the offense prior to its discovery**, but the district court did not make particularized findings that discovery was unlikely absent disclosure.

#### **UNMENTIONED FACTORS**

*United States v. Adelman*, 168 F.3d 84 (2d Cir. 1999) upheld an upward departure based on the fact that the defendant’s **threatening communications affected people other than the direct victim**, a situation not provided for in the guidelines.

*United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999), rejected a prior **adverse civil judgment** as a basis for downward departure in sentencing for fraud. It was foreseeable that fraud victims would seek to recover damages in civil actions, and therefore the adverse judgment did not take defendant’s case outside heartland of fraud cases. The court of appeals noted that an adverse civil judgment is quite different from the substantial, voluntary restitution that the court held was a permissible basis for downward departure in *United States v. Garlich*, 951 F.2d 161, 163 (8th Cir.1991).

*United States v. Leahy*, 169 F.3d 433 (7th Cir. 1999), approved the district court's departure from the offense levels specified in §2K2.1 where that guideline was being used only as the **most analogous guideline** for the instant offense, and therefore **did not consider the type or extent of harm posed by defendant's conduct**. Defendant was convicted under 18 U.S.C. § 175 for possession of ricin, a highly toxic substance; there is no guideline promulgated to cover this statute. The court of appeals expressed "doubt that a case in which a district court is required to apply the most 'analogous' guideline pursuant to USSG §2X5.1 can ever be found to fall within the 'heartland' of that guideline. Instead, we believe such a case is, by definition, an 'unusual case' and, therefore, a suitable candidate for either an upward or downward departure." The factors relied upon by the district court were: (1) the maximum penalty for possession of a toxin under 18 U.S.C. §175(a) is life whereas the maximum penalty for possession of a destructive device (covered by 2K2.1) is only ten years; (2) the number of toxins possessed by Leahy (two); (3) the high toxicity of ricin and other substances in defendant's possession; and (4) the potential for mass homicides ricin afforded. In an extensive analysis, the court of appeals noted that several of the factors relied upon by the district court are arguably encouraged bases for upward departure under §§5K2.6 and 5K2.14.

*United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (*en banc*), held that the district court could properly depart based on the **circumstances of the underlying aggravating felony**, in this case, a sale of \$20 worth of heroin. The Ninth Circuit, sitting *en banc*, overruled prior circuit precedent to the contrary, *United States v. Rios-Favela*, 118 F.3d 653 (9th Cir. 1997).

*United States v. Solis*, 161 F.3d 281 (5th Cir.), vacated by 169 F.3d 224 (1998), upheld a 5-level downward departure based on the defendant's **substantial assistance** to government, as mitigating circumstance of a kind or to a degree not adequately taken into consideration by commission, **in the absence of a government motion** for a §5K1.1 departure. The fact that the defendant was debriefed at least four times and debriefings covered subjects that were relevant to government's investigation took the case out of the heartland.

*United States v. Scott*, 145 F.3d 878 (10th Cir. 1998), upheld a 2-level departure based on the fact that the defendant commenced **two separate murder-for-hire conspiracies against a single victim**.

*United States v. Fenner*, 147 F.3d 360 (4th Cir. 1998), upheld the district court's determination that departure based on the large **increase in sentencing range resulting from a cross-reference** was not permitted. The court of appeals viewed the enhancement resulting from application of a cross-reference as an unmentioned departure factor, and then, under *Koon*, determined whether the enhancement is taken into account within the heartland of the applicable guidelines. The language of the cross-reference plainly indicates that the guidelines take into account that the application of the cross-reference will result in an enhanced guideline range.

*United States v. Jones*, 158 F.3d 492 (10th Cir. 1998), ruled that the fact that the defendant was **unaware that he could not possess a firearm** because he was subject to a domestic restraining order was not a valid basis for departure.

*United States v. Coleman*, 138 F.3d 616 (6th Cir. 1998), held that the district court should have considered whether a downward departure was warranted based on the government's alleged improper targeting and **inducement of African American parolees to commit crack cocaine offenses**.

*United States v. Nevels*, 160 F.3d 226 (5th Cir. 1998), upheld a 7-level upward departure based on **egregious behavior**. The defendant was convicted of possession of stolen mail; the district court cited, as egregious behavior warranting departure, the fact that the stolen Social Security checks are government securities; that recipients rely on these checks for subsistence; that the defendant had participated in this scheme for several months; that defendant had jointly participated with others; that the defendant had used fake identifications.

*United States v. Woods*, 159 F.3d 1132 (8th Cir. 1998), upheld a departure from the money laundering guideline, whereby the district court sentenced the defendant according to the offense level for the underlying offense, bankruptcy fraud. The court of appeals agreed that the main purpose of the money laundering statutes was to combat drug trafficking and organized crime, that the money laundering guidelines were designed to be used principally in that context, and that her **deposit of proceeds** from sale of stock that had been fraudulently concealed from bankruptcy trustee **was not serious money laundering conduct** contemplated for punishment under money laundering guidelines.

*United States v. Jones*, 160 F.3d 473 (8th Cir. 1998), remanded for consideration of a downward departure based on the fact that the **government's conduct** in reducing the sentences of more culpable coconspirators who testified (and being "less than forthright with the jury" about the arrangements) may have prejudiced the defendants.

*United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (*en banc*), held that the district court could properly depart based on the fact that, because of the delay in indicting and sentencing the defendant on the federal charge, **defendant lost the opportunity to serve ten months or more of his state sentence concurrently with his federal sentence**. The Ninth Circuit, sitting en banc, overruled prior circuit precedent to the contrary, *United States v. Huss*, 7 F.3d 1444 (9th Cir. 1993), and *United States v. Daggao*, 28 F.3d 985 (9th Cir. 1994).

*United States v. Webb*, 134 F.3d 403 (D.C. Cir. 1998), reversed a departure based on a claim that **police waited until the third purchase of cocaine from defendant before arresting** him; absent a showing that the government agent overpaid for the drugs or led defendant to commit a crime he would otherwise not have committed, the government's conduct did not warrant departure.

*United States v. Wells*, 163 F.3d 889 (4th Cir. 1998), upheld an upward departure based on defendant's **domestic terrorist activities**, even though no provision at the time authorized the court to consider such activities as the basis for a departure.

*United States v. Montz-Gaviria*, 163 F.3d 697 (2d Cir. 1998), remanded to allow the district court to consider a departure based on **uncredited time served by defendant in state custody on a detainer** lodged by the INS prior to defendant's conviction.

*United States v. O'Hagan*, 139 F.3d 641 (8th Cir. 1998), found that, under *Koon*, a downward departure for **credit for expired state sentences** based on the same conduct was not prohibited, although the applicable 1987 version of USSG §5G1.3 did not provide for such a departure.

*United States v. Miller*, 146 F.3d 1281 (11th Cir. 1998), reversed a departure based on the defendant's **impulse control disorder** and on the **defendant's claim that, despite his conviction, he was not a pedophile**. The defendant argued that he used the images of children in barter to get pornographic images he was interested in and that his impulse control disorder contributed to his pornographic interest. The court of appeals rejected the departure on several grounds. First, just because the defendant was not a pedophile, the harm in the offense is sustaining a market for child pornography, of which the defendant was guilty. Second, impulse control disorders are not unusual among those who collect child pornography, so this aspect of the defendant's personality did not separate him from other defendants. Finally, the testimony failed to link the disorder to the offense, so no §5K2.13 departure for **diminished capacity** was appropriate.

*United States v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998), remanded for a determination of whether an **undercover agent's sexual misconduct with the defendant during the investigation** was sufficient to take the case outside the heartland so as to justify a downward departure. The court of appeals stated that, under *Koon*, government investigatory misconduct that is unrelated or only tangentially related to the guilt of the defendant is an unmentioned departure factor and is not categorically proscribed from consideration.

*United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998), vacated a downward departure predicated on the **monetary loss in the case overstating the gravity of the offense** for failing to truthfully account for and pay employment withholding taxes. The district court had found that defendant structured payments to delay payment of a portion of employment taxes, but ordinarily paid them, although late, with penalties and interest, until his financial circumstances prevented him from doing so. The court concluded that there was **no intent to defraud** and, therefore, **monetary loss was not a proper measure of culpability**. The appellate court noted that defendant's intention to repay may remove his case from the heartland of tax evasion, but questioned the appropriateness of the district court's borrowing from the fraud guidelines the concept of monetary loss overstating culpability. The court of appeals remanded, stating that the

factors weighing against any departure, and certainly one of this degree, from a minimum of 41 months down to 13 months, received inadequate attention in the district court's opinion.

*United States v. Terry*, 142 F.3d 702 (4th Cir. 1998), held that the sentencing court abused its discretion in departing upward 3 levels for the **extreme psychological injury to the family members of the victims who were killed**. Although a departure for psychological injury to a victim is "not limited to the direct victim of the offense of conviction" but can also apply to indirect victims, an indirect victim is a victim "because of his relationship to the offense, not because of his relationship to the direct victim."

*United States v. Delmarle*, 99 F.3d 80 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1097 (1997), affirmed an upward departure based on a finding that the defendant's **use of a computer to transmit child pornography over the Internet to minors "to seduce a minor to engage in sexual activity"** was outside the heartland of cases covered by the sentencing guidelines.

*United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996), *cert. denied*, 519 U.S. 1117 (1997), affirmed an upward departure based on a finding that the defendant's conduct was part of a systematic **corruption of a governmental function** causing loss of public confidence in government.

*United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir.), *cert. denied*, 118 S. Ct. 1855 (1998), upheld a district court's decision that it lacked authority to depart based in part on the **deterrent effect defendant experienced when hospitalized for ingesting the heroin** he attempted to import. The court noted that defendant was aware of the health risks involved prior to the trip; the manifest danger in swallowing 90 pellets of heroin did not deter him in the first place, and the physical trauma, inherent in smuggling drugs in this manner, could hardly be considered an unusual characteristic.

*United States v. Perkins*, 108 F.3d 512 (4th Cir. 1997), reversed a downward departure based on the **comparatively lenient treatment given the defendant's similarly situated white codefendants**, and the district court's belief that a **decreased sentence more accurately reflected the defendant's culpability in the conspiracy**. According to the appellate court, the disparity cited by the district court resulted from a proper exercise of prosecutorial discretion in selecting the charges to bring against each codefendant.

*United States v. Brock*, 108 F.3d 31 (4th Cir. 1997), remanded where the district court, prior to *Koon*, revealed that its refusal to consider a downward departure for **post-offense rehabilitation** was because it believed that the law of the circuit prohibited it from doing so. According to the Fourth Circuit, the *Koon* decision rejected the reasoning used in its prior decision and effectively overruled its decision that post-offense rehabilitation can never form a proper basis for departure. Because post-offense rehabilitation is taken into account in the acceptance of responsibility guideline, a departure based on post-offense rehabilitation is



permitted “only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility is granted.”

*United States v. Walters*, 87 F.3d 663 (5th Cir.), cert. denied, 117 S. Ct. 498 (1996), affirmed a downward departure where **defendant received no personal benefit from money laundering**. According to the appellate court, because the money laundering guideline makes no mention of failure to receive personal benefit as a mitigating factor, the district court did not abuse its discretion in making the departure.

*United States v. Arce*, 118 F.3d 335 (5th Cir. 1997), cert. denied, 118 S. Ct. 705 (1998), affirmed an upward departure based on the conduct of a defendant who pleaded guilty to charges involving possession, transfer, and manufacture of illegal weapons. The appellate court found that the upward departure was not an abuse of discretion considering the **defendant took affirmative steps to conceal illegal activity** and ownership of illegal firearms and **made a videotape to teach others** how to make silencers outside of the government’s regulatory scheme.

*United States v. Lopez*, 106 F.3d 309 (9th Cir. 1997), affirmed a downward departure based on a finding that **government conduct prejudiced the defendant’s case**. The appellate court found that the prejudice the defendant encountered during plea negotiations was significant enough to take the case out of the heartland.

*United States v. Charry Cubillos*, 91 F.3d 1342 (9th Cir. 1996), remanded a downward departure where the departure was based on the increased severity of the defendant’s sentence resulting from her **status as a deportable alien**. According to the appellate court, because this was not a factor mentioned in the guidelines, the district court must make a “refined assessment” of the facts.

*United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998), upheld, as a ground for departure, for an illegal reentry defendant, the defendant’s “**cultural assimilation**.” Defendant’s 23 years of legal residence in the United States (since age 12), his marriage to a United States citizen, and five children who were United States citizens provided significant cultural ties to the United States that made his motivation for illegal reentry or continued presence different from the typical economic motivation. The court noted that it may lessen a defendant’s culpability that his motivation is familial or cultural rather than economic.

*United States v. Meacham*, 115 F.3d 1488 (10th Cir. 1997), remanded a downward departure based on the **lack of significant physical or psychological harm** to the victim. According to the appellate court, the sentencing court erred in finding no harm to the victim. The child in this case required numerous therapy sessions and the harm suffered appeared to be typical of offenses involving molestation of children under the age of twelve. Further, lack of physical harm is clearly within the heartland of the offense. The court concluded that penetration by any means would have been a sexual act that would constitute criminal sexual abuse and would be covered by USSG §2A3.1.

*United States v. Goodluck*, 103 F.3d 145 (Table, text in WL), No. 95-2099 (**10th Cir.** Dec. 5, 1996) (unpublished), affirmed a downward departure based on a finding that the **sentence exaggerated the defendant's conduct** and culpability. According to the appellate court, the evidence revealed that the defendant was building fires to keep warm and **did not possess a clear intent** to commit arson.

*United States v. Atkins*, 116 F.3d 1566 (**D.C. Cir.**), *cert. denied*, 118 S. Ct. 430 (1997), reversed a downward departure based on a finding that the defendant was **not a threat to public safety**. According to the appellate court, the district court abused its discretion in concluding that the defendant was not a threat to public safety because the defendant had not actually injured law enforcement officers despite numerous opportunities. The appellate court found that the defendant had a pattern of violent resistance of arrest, hostage-taking, and armed threats against law enforcement.

### **COMBINATION OF FACTORS — §5K2.0, comment.**

*United States v. Cornielle*, 1999 WL 163540 (**2d Cir.** Mar. 24, 1999). The **combination** of the government's **four-year delay pre-indictment delay** and defendant's **post-offense rehabilitation** warranted a one-level downward departure.

*United States v. Reed*, 167 F.3d 984 (**6th Cir.** 1999), rejected a downward departure based in part on the district court's assessment that the **defendant's conduct was on the outer edges of that contemplated by the money laundering statutes** and in part on the **time and cost involved in her interlocutory appeal**. Although holding Reed less culpable than the typical money launderer, the district court provided no specifics and offered no factors not contemplated by the guidelines. Further, although delay, costs, and the toll that a delay takes on a defendant certainly may represent legitimate bases for a departure, the court of appeals stated that neither the district judge nor the defendant provided any evidence that the length of the delay or the costs involved in the appeal were unusual; in fact, defendant remained free on bond during the entire process.

*United States v. Payton*, 159 F.3d 49 (**2d Cir.** 1998), overturned a downward departure based on a combination of factors: two (**lack of positive male role model and history of drug abuse and failed treatment**) were invalid bases for departure, and the court was mistaken about a third reason, the **defendant's ineligibility for credit for his pre-trial detention** (defendant did receive credit). The sentencing court had stated that a fourth factor, defendant's **learning disability and loss of educational opportunities**, was inadequate, standing alone, to support a departure.

*United States v. Rioux*, 97 F.3d 648 (**2d Cir.** 1996), affirmed a downward departure based on the defendant's **physical impairment** (diseased kidney) and his **charitable works**, although neither factor would have been sufficient alone to warrant departure.

*United States v. Rybicki*, 96 F.3d 754 (4th Cir. 1996), reversed a downward departure based on the defendant's **alcohol problem, 20 years of military service, offense conduct not deemed a "serious fraud," susceptibility to abuse in prison because the defendant was a law enforcement officer, and problems associated with the defendant's status as a convicted felon**. According to the appellate court, "none of the six factors underlying the district court's decision justified a departure from the applicable guideline range."

*United States v. Drew*, 131 F.3d 1269 (8th Cir. 1997), reversed a downward departure for a defendant convicted of receiving child pornography based on the defendant's **high intelligence, disruption of education** (in doctoral program in chemistry), **employment consequences** (he would not be able to work in law enforcement, as planned), and **susceptibility of abuse in prison** (because of his conviction for child pornography). Intelligence was at best an unmentioned factor, for which departure would be highly infrequent; education and employment consequences are discouraged factors, and defendant was no different from most defendants with regard to these collateral consequences; finally, susceptibility to abuse in prison could be the basis for departure only in extraordinary cases.

*United States v. Sablan*, 114 F.3d 913 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 851 (1998), affirmed an upward departure based on **significant personal injury and property damage**. The appellate court concluded that the extent of the sentencing court's departure from the applicable guideline range was not an abuse of discretion where the court expressly relied on such approved grounds for departure as the nature of the injuries to the victims and significant property damage to a United States Post Office.

*United States v. Gallegos*, 129 F.3d 1140 (10th Cir. 1997), reversed a departure based on a combination of **disparity in sentences between defendant and her codefendants, defendant's minor role, coercion, lack of criminal history, and family responsibilities**. A departure for disparity is not justified when the disparity arises from a plea bargain; the minor role was adequately accounted for by a §3B1.2 reduction; there was no evidence of coercion; a criminal history category of I accounted for defendant's lack of criminal history, and defendant's family responsibilities were not extraordinary.

*United States v. Collins*, 122 F.3d 1297 (10th Cir. 1997), affirmed a downward departure from the career offender enhancement based on the defendant's **age, ill health, and a remote previous conviction** that resulted in a relatively lenient sentence. According to the appellate court, the sentencing court did not rely on any impermissible departure factors. The defendant was 64 at the time of sentencing and when released would be nearly 70 years old. The appellate court concluded that in light of the defendant's age and well documented infirmities, the district court was within its discretion in concluding that the defendant was **less likely to recidivate than the ordinary defendant categorized as a career offender**.

#### IV. Extent of Departures

## 18 U.S.C. § 3742(f)

If the reviewing court concludes that the decision to depart was not the result of an erroneous interpretation of the guidelines, it must then determine whether the resulting sentence outside the guideline range is unreasonable. If the court does not find the extent of the departure unreasonable, it must affirm the sentence.

### Guidelines

The guidelines contemplate two kinds of departures, guided and unguided. In the first, the guidelines provide policy guidance for departure by analogy or by suggestions. *See* USSG Ch. 1, Pt. A(4). The Commission has stated its view that most departures will reflect the suggestions and that the courts of appeal will be more likely to find departures unreasonable where they fall outside suggested levels. *Id.* Unguided departures may be for grounds mentioned in Chapter Five, Part K, or on grounds not mentioned in the guidelines.

Departures driven by considerations of criminal history categories are frequently referred to as horizontal departures, because they move along the horizontal axis of the Sentencing Table. Similarly, departures to higher or lower offense levels are referred to as vertical departures.

Prior to *Koon*, the **Ninth Circuit** required that the extent of an upward departure requires a comparison to analogous guideline provisions. *United States v. Lira-Barraza*, 941 F.2d 745 (**9th Cir.** 1991) (*en banc*). In *United States v. Sablan*, 114 F.3d 913 (**9th Cir.** 1997), *cert. denied*, 118 S. Ct. 851 (1998), however, the court stated its belief that the unitary abuse of discretion standard announced for analyzing the propriety of departures in *Koon* applies equally to an analysis of the extent of departures. The court rejected the analogous approach as “mechanistic” and held that where a district court sets out findings justifying the magnitude of its decision to depart and the extent of departure from the guidelines and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. 114 F.3d at 919. However, the court added that the district courts are not prohibited from considering the possible relevancy of analogous guidelines. An analysis and explanation by analogy may still be useful in determining and explaining the extent of departure, but is no longer essential. 114 F.3d at 919 n.10.

For example, in *United States v. Matthews*, 120 F.3d 185 (**9th Cir.** 1997), the district court made an upward departure in sentencing a defendant who placed a bomb that injured a third party, based on the substantial risk of death or serious injury to more than one person. The Ninth Circuit found the extent of the departure unreasonable, in that it exceeded the sentence defendant could have received had he been convicted of the offenses the district court analogized to in order to set the departure. Where a guideline is used by analogy as approximating defendant’s conduct, the reasonableness of the departure is evaluated by treating the aggravating factor as a separate crime and asking how the defendant would be treated if convicted of it.

In *United States v. Roston*, 168 F.3d 377 (**9th Cir.** 1999), the Ninth Circuit approved a 7-level upward departure for extreme conduct where defendant was convicted of second-degree

murder for killing his wife on their honeymoon. The court noted that, although such a departure is substantial, the district court was well-positioned to determine if the facts of this case were unusually cruel or brutal, as compared to other second-degree murder cases. “It is appropriate to defer to the district court’s assessment in this case.” Following *Sablan*, the court emphasized that where a district court sets out findings justifying the magnitude and extent of its departure from the Guidelines, and the explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. In this case, the court of appeals held that the resulting 405-month term of incarceration “is not an unreasonable punishment for a man who killed his wife in such a barbaric manner.”

The **Second** and **Third Circuits**, in pre-*Koon* decisions, indicated that they favor the use of analogous guideline provisions to guide departures. *United States v. Rodriguez*, 968 F.2d 130, 140 (**2d Cir.**), *cert. denied*, 506 U.S. 847 (1992); *United States v. Kikumura*, 918 F.2d 1084, 1113 (**3d Cir.** 1990). Post-*Koon*, the Third Circuit has adhered to the analogic approach dictated by *Kikumura*. In *United States v. Jacobs*, 167 F.3d 792 (**3d Cir.** 1999) the court remanded a 5-level upward departure under §5K2.3 for “**extreme psychological injury**” because the district court should have specifically articulated the reasons for the degree of the departure. The district court did not engage in the analogic reasoning required under *Kikumura* in arriving at a 5-level departure, as opposed to some other numerical level of departure. Also post-*Koon*, the Second Circuit has signaled its continuing approval of the analogic method. In *United States v. Adelman*, 168 F.3d 84 (**2d Cir.** 1999), approved the use of analogizing to the grouping principles as an appropriate basis for determining the extent of its upward departure for threats to people other than the direct victim. The district court created hypothetical counts for each of the multiple victims of defendant’s threats, then, because counts involving different victims are not grouped under §3D1.1, the court calculated a four-level increase in defendant’s offense level. The court of appeals held that the grouping methodology was not an abuse of discretion.

Also in a pre-*Koon* decision, the **Seventh Circuit** approved using analogies and also treating a §5K2.0 aggravating factor as a separate crime, asking how the defendant would be treated if convicted of it. *United States v. Ferra*, 900 F.2d 1057, 1062-63 (**7th Cir.** 1990). The Seventh Circuit does not read *Koon* as altering its reviewing authority over the magnitude of a departure chosen by the district court. According to that appellate court, although *Koon* changed the standard of review with respect to whether to depart at all, it did not change the circuit’s rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. *United States v. Horton*, 98 F.3d 313 (**7th Cir.** 1996). In *United States v. Krilich*, 159 F.3d 1020 (**7th Cir.** 1998), for example, the court reversed a 7-level downward departure based on the district court’s statement that the offense level in §2F1.1 overstated the seriousness of defendant’s conduct; the court of appeals held that the district court’s reasoning was inadequate to support such a departure.

The Seventh Circuit rejected a 10-level upward departure in *United States v. Leahy*, 169 F.3d 433 (**7th Cir.** 1999), stating, “While this Court has approved of looking to an analogous sentencing guideline in measuring the extent of a departure, we must be mindful that the analogy selected is an appropriate one.” The court of appeals held that the facts of the case did not

warrant the district court's analogy to the terrorism guideline, since the defendant did not attempt to influence or affect the conduct of the government and had at most threatened to use the toxins he had developed against various family members and friends. The court found it significant, in looking at other guidelines, that the defendant could have attempted to use the toxin, even causing significant injury to a victim, and potentially have received a less severe sentence than that which the district court imposed for his conduct in merely possessing a toxin. The court of appeals held that a departure logically should not exceed the level defendant could have received had he actually committed a more serious offense.

The **Tenth Circuit** has held that, in departing from the applicable guideline range, a district court "must specifically articulate reasons for the degree of departure." *United States v. Yates*, 22 F.3d 981, 990 (**10th Cir.** 1994). The district court "may use any 'reasonable methodology hitched to the sentencing guidelines to justify the reasonableness of the departure,'" including using extrapolation from or analogy to the guidelines. *United States v. Jackson*, 921 F.2d 985, 989-990 (**10th Cir.** 1990). The Tenth Circuit has indicated a view that the *Koon* decision does not affect the analysis of the degree of departure. *United States v. Collins*, 122 F.3d 1296 (**10th Cir.** 1997). Post-*Koon*, the court has reaffirmed that, while the district court is not required to justify its degree of departure from the guidelines with mathematical exactitude, its justification must include some method of analogy, extrapolation, or reference to the guidelines. *United States v. Whiteskunk*, 162 F.3d 1244 (**10th Cir.** 1998).

The **First Circuit** requires that the court provide a "reasoned justification for its decision to depart" so long as that statement "constitutes an adequate summary from which an appellate tribunal can gauge the reasonableness of the departure's extent, [the court] has no obligation to go further and attempt to quantify the impact of each incremental factor on the departure sentence." *United States v. Emery*, 991 F.2d 907, 913 (**1st Cir.** 1993). No post-*Koon* decision yet indicates the First Circuit's view as to whether the *Koon* affected the analysis of the degree of departure. In *United States v. Brennick*, 134 F.3d 10 (**1st Cir.** 1998), the court vacated a downward departure because the monetary loss in the case overstated the gravity of the offense for failing to truthfully account for and pay employment withholding taxes. The court concluded that there was no intent to defraud and, therefore, monetary loss was not a proper measure of culpability. The court of appeals noted that defendant's intention to repay may remove his case from the heartland of tax evasion, but questioned the appropriateness of the district court's borrowing from the fraud guidelines the concept of monetary loss overstating culpability. In remanding, the court expressed doubt that the extent of the departure, from a range of 41-51 months to 13 months, was justified, but declined to state a downward limit, noting that the district court should fully consider three factors weighing against the departure: indications that defendant may not have intended to repay the entire amount; defendant's false statements that amounts due to the government had been paid; and the crime of structuring.

Similarly, the **Sixth Circuit** has not outlined its view of whether *Koon* affects the standards for reviewing the extent of a departure. In *United States v. Crouse*, 145 F.3d 786 (**6th Cir.** 1998), the court held that the court should be guided by the structure of the guidelines in its determination of the scope of a departure. The district court in this case had made no reference to

the guidelines in determining the extent of the downward departure; the court instead had determined the result—no jail time—and departed downward to a level that would allow this result. Such a methodology is an abuse of discretion.

### **Methodology for Criminal History Departures**

The guidelines suggest that in considering a departure for adequacy of criminal history category, the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category. If, for example, the court concludes that Criminal History Category III underrepresents the seriousness of defendant's criminal history, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. §4A1.3 (p.s.) These departures are referred to as horizontal, because they move along the horizontal axis of the Sentencing Table.

Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case. §4A1.3 (p.s.)

Some examples of appellate court analyses of criminal history departures follow:

*United States v. Lawrence*, 161 F.3d 250 (**4th Cir.** 1998), reiterated Fourth Circuit methodology for criminal history departures. If a court chooses to depart based on an inadequately represented criminal history, it has two options. A sentencing court should depart first to the next higher category and move on to a still higher category only upon a finding that the next higher category fails adequately to reflect the seriousness of the defendant's record. If the court gets to level VI and determines that its sentencing options are still insufficient and that the defendant's prior criminal conduct is of sufficient seriousness to conclude that he should be treated as a career offender, the district court may depart directly to the guideline range applicable to career offenders similar to the defendant.

*United States v. Tropiano*, 50 F.3d 157 (**2d Cir.** 1995), rejected an increase of seven offense levels for a confirmed recidivist at the peak of his criminal career; the court was required to follow the procedure for departing horizontally.

*United States v. Boe*, 117 F.3d 830 (**5th Cir.** 1997): Defendant moved for modification of his sentence pursuant to 18 U.S.C. § 3582(c)(2), requesting that his sentence be reduced in light of a 1995 amendment to the guidelines which changed the method of calculating the weight equivalency of marijuana plants. The district court declined to reduce the sentence, stating that the defendant's criminal score underrepresented the seriousness of defendant's past conduct. The **Fifth Circuit** remanded, noting that, even including an old conviction, the criminal history category would have been II, whereas the sentence received by defendant was equivalent to

category VI. The district court erred by failing to consider intermediate categories and would have to justify a category VI range.

*United States v. Ewing*, 129 F.3d 430 (7th Cir. 1997), affirmed an upward departure based in part on defendant's high number of criminal history points—25, when category VI begins at 13 points. The district court added 1 offense level for every 3 criminal history points that exceeded 15. The appellate court found this methodology reasonable and sufficiently linked to the structure of the guidelines.

*United States v. Collins*, 122 F.3d 1297 (10th Cir. 1997), affirmed the court's methodology in a downward departure from the career offender enhancement. The court applied a sentence within the range that would have applied without the enhancement, after finding that the enhancement significantly overstated defendant's criminal past and likely criminal future and that a sentence within the range applicable without the enhancement adequately reflected the situation. The appellate court had previously held such a departure reasonable. *United States v. Bowser*, 941 F.2d 1019, 1026 (10th Cir. 1991).

## **V. Notice Requirements**

### **Sentencing Reform Act's Procedural Amendments**

The same Sentencing Reform Act of 1984 that initiated the guidelines system also made procedural reforms to achieve the congressional goals of "certainty and fairness" in sentencing. Because a court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment, more formality was thought to be necessary in determining such issues. Federal Rules of Criminal Procedure 32 was amended to provide for adversarial development of the factual and legal issues relevant to determining the appropriate guidelines sentence. The amended rule directs the probation officer to prepare a presentence report addressing all matters germane to the sentence and requires that the report be disclosed to the parties in order that they may file responses or objections with the court. Rule 32 mandates that the parties be afforded "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Fed. R. Crim. P. 32(a)(1).



### ***Burns v. United States***

In *Burns v. United States*, 501 U.S. 129 (1991), the U.S. Supreme Court reasoned that the right to be heard on an issue is rendered meaningless unless one is informed that a decision on the issue is contemplated. The Court held that before a district court can depart upward from the applicable guideline range on a ground not identified as a ground for such departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the court give the parties reasonable notice that it is contemplating such a ruling, specifically identifying the ground for the departure.

The *Burns* requirement has been incorporated into the guidelines as a policy statement: “When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor.” USSG §6A1.3(a).

The circuit courts have further refined the concept of what notice is required by Rule 32:

*United States v. Canada*, 960 F.2d 263 (**1st Cir.** 1992), found that the *Burns* notice requirements do not apply to upward adjustments to the offense level pursuant to Chapter Three, at least when the basis of the adjustment is known.

Several courts have held that the *Burns* notice requirements do not apply to deviations from the nonbinding policy statements found in Chapter Seven of the guidelines. *United States v. Burdex*, 100 F.3d 882, 885 (**10th Cir.** 1996), *cert. denied*, 117 S. Ct. 1283 (1997); *United States v. Hofierka*, 83 F.3d 357, 362 (**11th Cir.** 1996), *modified*, 92 F.3d 1108 (**11th Cir.** 1996), *cert. denied*, 117 S. Ct. 717 (1997); *United States v. Mathena*, 23 F.3d 87, 93 n.13 (**5th Cir.** 1994); *United States v. Pelensky*, 129 F.3d 63, 70 (**2d Cir.** 1997).

*United States v. Dolloph*, 75 F.3d 35 (**1st Cir.**), *cert. denied*, 116 S. Ct. 1866 (1996), upheld an upward departure where the court did not give notice of two of the grounds for departure stated by the court, but the extent of the departure was fully justified by the ground of which defendant had notice and there was “no realistic possibility” of a different result on remand.

*United States v. Gabriel*, 125 F.3d 89, 106 (**2d Cir.** 1997), applied the *Burns* notice requirement to departures from the guideline fine range.

*United States v. Lopreato*, 83 F.3d 571 (**2d Cir.**), *cert. denied*, 117 S. Ct. 187 (1996), upheld an upward departure, stating that, even if notice of the court’s intent to depart was not sufficient under *Burns*, the error was harmless beyond a reasonable doubt because the argument defendant would have made against the departure was explicitly taken into account by the sentencing court.

*United States v. Pankhurst*, 118 F.3d 345 (**5th Cir.**), *cert. denied*, 118 S. Ct. 630 (1997), reversed a downward departure when the district court cited grounds not previously noticed; the

court held that Fed. R. Crim. P. 32 provides that the government also is entitled to notice of the court's intent to depart. *See also United States v. Andruska*, 964 F.2d 640, 644 (**7th Cir.** 1992).

*United States v. Johnson*, 121 F.3d 1141 (**8th Cir.** 1997), vacated and remanded an upward departure under §5K2.8 based on the cruel and brutal nature of the offense when the presentence report stated explicitly that there were no factors to warrant departure and the possibility of departure was not brought up until just before the court pronounced the sentence.

*United States v. Hinojosa-Gonzalez*, 132 F.3d 1314 (**9th Cir.** 1997), vacated a departure based on a combination of prior unpunished criminal conduct and extraordinary drug quantity, grounds that were not advanced until the sentencing hearing. The court held that notice of both the factual and legal grounds for departure is required by Fed. R. Crim. P. 32 and *Burns v. United States*, 501 U.S. 129, 138 (1991).